STATE OF MICHIGAN

COURT OF APPEALS

LORI MICHELLE ROLFE, a/k/a LORI MICHELLE CHANCES, Plaintiff-Appellant,	UNPUBLISHED January 16, 2007
v	No. 273000 Calhoun Circuit Court
CHARLES ERNEST ROLFE, Defendant-Appellee.	LC No. 01-002854-DM

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the order modifying a previous custody order and awarding defendant sole physical and legal custody of the parties' two minor children, Brenna (d/o/b 01/26/00) and Juliana (d/o/b 10/17/01). We affirm.

I. Background

The parties both lived in Battle Creek at the time of their June 2002 divorce. On October 6, 2003, the parties stipulated to modify the custody agreement set forth in the divorce judgment. The parties agreed to share joint legal and physical custody of the children and that plaintiff could move the children to the New York City area or to New Jersey, with defendant having ten weeks of parenting time each year. Plaintiff and the children moved in with plaintiff's sister in New Jersey. This living arrangement existed until July 2004 when plaintiff and her sister had a falling out. Defendant agreed that the children could live with him until plaintiff could secure full-time employment and housing.

In August 2004, while the children were still living with defendant, defendant filed a motion for a change of custody. Plaintiff had just secured a full-time job and temporary housing with her boyfriend. The children were forcibly removed from defendant's custody in October 2004 and returned with plaintiff to New Jersey. Plaintiff and her boyfriend later moved with the children to a larger house in the same general area.

The parties agreed to have the matter evaluated by the Friend of the Court and heard by a referee. After several hearings that spanned many months, the referee issued her recommendations on June 5, 2006. The referee recommended that the parties continue to have joint legal custody, but that defendant be awarded sole physical custody of the children. Plaintiff

objected to the referee's recommendations. After reviewing all the hearing transcripts, the trial court issued its own opinion and order, in which it accepted some of the referee's findings and rejected others. Ultimately, it awarded defendant sole physical and legal custody of the children.

II. Change in Circumstances

A custody award may be modified on a showing of proper cause or a change of circumstances that establishes that the modification is in the child's best interests. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). Plaintiff first argues that the trial court erred in failing to address whether defendant established proper cause or a change of circumstances sufficient to warrant a change of custody. This Court reviews questions of law in a custody case for clear legal error. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). While the trial court did not specifically state that it found proper cause or a change of circumstances sufficient to revisit the custody order, we are satisfied that it accepted the referee's findings on this issue.

Plaintiff next argues that the trial court clearly erred in finding that either proper cause or a change of circumstances existed to justify revisiting the prior custody order. To constitute a change of circumstances meriting consideration of a custody change, there must have been a change in conditions pertaining to custody since the entry of the last custody order that has had or could have a significant impact on the child's well-being. *Id.* at 513. Defendant alleged in his motion that the children had been living with him since July 9, 2004, at plaintiff's request. The referee cited plaintiff's residential changes as one reason to find that a change in circumstances existed. The evidence showed that after plaintiff was asked to leave her sister's house, she was temporarily homeless while the children resided with defendant. By August 2004, she was living temporarily with her boyfriend.

While the mere distance of plaintiff's move, standing alone, was insufficient to find a change in circumstances, *Dehring v Dehring*, 220 Mich App 163, 166-167; 559 NW2d 59 (1996), the reasons for the move, plaintiff's instability, was sufficient to show a change in circumstances. Plaintiff had a new job and a temporary living situation, her future was uncertain, and the children had been living with defendant. The trial court did not clearly err in determining that the totality of these conditions could have a significant impact on the children's well being. Because this circumstance alone justified the trial court's determination, it is unnecessary to address whether the remaining factors identified by plaintiff on appeal were sufficient to establish a change in circumstances.

III. Best Interest Factors

Plaintiff also argues that the trial court's findings regarding the best interest factors in MCL 722.23 are against the great weight of the evidence.

When modification of a custody order would change the established custodial environment of a child, the moving party must show that a change in custody is in the child's best interests by clear and convincing evidence. MCL 722.27(1)(c). The best interest factors are:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

This Court reviews the trial court's factual findings under the great weight of the evidence standard. The trial court's factual findings should be affirmed unless the evidence clearly preponderates in the opposite direction. *Vodvarka, supra* at 507.

Plaintiff takes issue with the trial court's findings regarding factors (b) - (g) and (j) - (l). The trial court found that factor (b), the parties' ability to give love, affection, and guidance, did not favor either party. The court stated that "neither party has demonstrated much proclivity to provide the children with sound guidance" and "the parties are equally bereft in their ability to supply sound guidance to their children." Plaintiff argues that the great weight of the evidence favored her because she testified about her parenting philosophy, manner of discipline, and participation in the children's religious education. The evidence indicated that both parties spent considerable time arguing with each other, focusing on themselves to the detriment of the

children. Also, both parties testified that the children were well behaved and both had similar parenting philosophies. Additionally, both were guilty of swearing in front of the children. The evidence does not clearly preponderate in favor of plaintiff.

The trial court found that factor (c), the parties' ability to provide basic material needs, favored plaintiff. The court stated that defendant's failure to pay day care expenses clearly demonstrated his lack of disposition to provide for the children and outweighed plaintiff's post-October 2003 unstable employment history. Plaintiff argues that the trial court did not give the factor enough weight because it failed to consider that many of her problems could have been avoided had defendant made his day care payments.

Simply because the trial court did not reference this point does not mean that it did not consider it. The trial court need not comment on every matter in evidence or declare acceptance or rejection of every proposition argued. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). And we believe that plaintiff's progression of problems that she asserts could have been avoided by defendant's child care payments stretches too far and would have had the trial court engaging in pure speculation.

Plaintiff also asserts that defendant's handling of Brenna's plantar warts and the children's car seats shows that this factor should have been weighed more heavily in her favor. We agree with the trial court that the wart issue was minor with regard to determining custody. Defendant did not refuse to treat Brenna, but rather was overzealous in the treatment course he chose. Regarding the car seats, defendant's stubbornness to realize that the seats were inappropriate for the children reflected negatively on him and the trial court considered this fact under factor (f). It appears that the issue had less to do with defendant's unwillingness to provide a material need and more to do with his need to be right. Viewing the evidence as a whole, we do not believe that the trial court clearly erred in failing to give more weight to this factor.

The trial court found that factor (d), stability of the children's home environment, favored defendant and gave this factor significant weight. This factor "calls for a factual inquiry (how long has the child been in a stable, satisfactory environment?) and then states a value ('the desirability of maintaining continuity')." *Ireland v Smith*, 451 Mich 457, 465 n 8; 547 NW2d 686 (1996). The trial court recognized that the children had resided longer with plaintiff, but found that defendant's home was more stable. It further stated, "While there may have been a long term day care provider and activities enjoyed by the children in New Jersey, these are not tantamount to stability, nor do they equate to a desirability to maintain continuity when one considers the instability of the plaintiff/mother's lifestyle and the home environment that she created for her children."

Plaintiff assumes that the trial court was referring to her residential changes and number of boyfriends when it commented on the instability of her lifestyle and home environment. She asserts that the moves were done to better her and the children's circumstances and there was no evidence that her home was an undesirable environment. While plaintiff appeared to be stable, both financially and emotionally, at the time the trial court rendered its decision, the evidence indicated that plaintiff would fall apart and become emotionally unstable when her environmental stressors increase. Since the entry of the October 2003 custody order, plaintiff had a series of boyfriends, jobs, and residences that likely were attributable to her period of

instability. The trial court was concerned with how plaintiff would handle future problems in her life and the effect on the children. The evidence established the long-term stability of defendant's life and home. Weighing the parties' historical stability and particularly considering the desirability of maintaining continuity in the future for the children, the trial court's finding that this factor favored defendant is not against the great weight of the evidence.

The trial court found that factor (e), permanence of the family unit, favored defendant and gave the factor significant weight, but did not offer additional comment beyond accepting the referee's findings on this factor. Evaluation of this factor requires consideration of the permanence of a custodial home, not the acceptability of a custodial home. While there is overlap between factors (d) and (e), factor (e) focuses on the child's prospects for a stable family environment. *Ireland, supra* at 465. It inquires "into the extent to which a 'home' will serve as a permanent "'family unit.'" *Id*. at 465 n 8. "The stability of a child's home can be undermined in various ways. This might include frequent moves to unfamiliar settings, a succession of persons residing in the home, live-in romantic companions for the custodial parent, or other potential disruptions. Of course, every situation needs to be examined individually." *Id*. at 465 n 9.

Plaintiff argues that her number of past boyfriends was not relevant because she was in a long-term committed relationship with her current boyfriend, to whom she was engaged at the time of the hearings. She asserts that there was no evidence that her relationship was anything other than permanent and stable and that this factor should have at least been weighed equally between the parties. While there was no evidence that plaintiff's current home was unstable, the trial court also had to consider plaintiff's history. The trial court's concern was with what would happen if plaintiff and her fiancé separated. Plaintiff had a history of relying extensively on others. Although there was an indication that plaintiff had settled down, the referee was not convinced that plaintiff was not motivated by the litigation. After reviewing all the transcripts, the trial court accepted this finding. The trial court's finding is not against the great weight of the evidence.

The trial court found that factor (f), the parties' moral fitness, did not favor either party, accepting the referee's findings without additional comment. The referee stated that the moral fitness of both parties was deplorable. It noted plaintiff's multiple boyfriends, the swearing by both parties, defendant's failure to have proper child safety seats, and the presence of inappropriate magazines in his home. Plaintiff argues that the great weight of the evidence favored her.

Plaintiff asserts that defendant's significant use of obscenities in front of the children, inability to control his anger when provoked, and presence of pornography in his home showed more of a lack of moral fiber than did the amount of boyfriends she had and her swearing outside the children's presence. The evidence indicated that both parties swore both in front of and outside the presence of the children and were purposefully contentious toward each other. Plaintiff downplays the significance of her boyfriends, noting that she only introduced two of them to her children. However, plaintiff dated both of them less than four months before they were introduced to the children. The evidence does not clearly preponderate in favor of plaintiff.

The trial court found that factor (g), the parties' mental and physical health, weighed in favor of defendant. Plaintiff asserts that her testimony and that of her psychologist was discounted in favor of her sister's testimony. This was the trial court's prerogative. Even so, the

trial court considered their testimony and gave weight to the cyclical nature of plaintiff's depression throughout her life when faced with environmental stressors. The only medical issue of note for defendant was his hepatitis C condition, which was in remission. The evidence does not clearly preponderate in favor of plaintiff.

Citing *Glover v McRipley*, 159 Mich App 130; 406 NW2d 246 (1987), plaintiff also argues that the trial court failed to consider the age differences between the parties and the probability of defendant's increase in health issues. But in *Glover* the Court merely stated that the trial court's finding that this factor favored the defendant, given the age difference between the parties, was not clearly erroneous. Notably, the *Glover* Court stated that "the weight assigned by the trial court was more than generous" to the defendant. *Id*. at 141. Here, there was no indication that defendant would have any age-related health issue in the near future. The trial court did not err in failing to accord weight to the parties' age differences.

The trial court found that factor (j), the parties' willingness to facilitate a relationship between the children and the other parent, did not favor either party and accepted the referee's findings without further comment. The referee stated that both parties had been completely deplorable in this area. Plaintiff asserts that the trial court gave no weight to the fact that she once drove the children to her sister's house in order to facilitate a parenting exchange. However, this one-time effort is not enough to tip the scales and say that the evidence clearly preponderates in plaintiff's favor.

The trial court found that factor (k), domestic violence, did not favor either party and accepted the referee's findings without further comment. The referee found that plaintiff had engaged in a few instances of physical violence and that both parties were extremely verbally abusive. This factor considers all instances of domestic violence, regardless of whether they were witnessed by the children. MCL 722.23(k). The evidence established that both parties were verbally abusive to each other. The trial court's finding is not against the great weight of the evidence.

Lastly, plaintiff objects to the trial court's acceptance of the referee's finding regarding factor (l), any other factor. The referee appears to have found the factor equal, simply noting various concerns about the parties under this factor. The only specific argument plaintiff makes is that the length of the parties' respective school breaks were improperly considered. However, the referee mentioned the school breaks in regard to parenting time, not the custody determination. Plaintiff does not argue that this factor should have favored her.

IV. De Novo Hearing

After the referee issue her recommendations, plaintiff objected and requested that the trial court conduct a de novo hearing. Instead of holding a live hearing, the trial court reviewed the hearing transcripts and issued its own opinion. Plaintiff now argues that the trial court erroneously failed to conduct a de novo hearing pursuant to MCR 3.215(F)(2) and MCL 552.507. Questions of statutory interpretation are questions of law that this Court reviews de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

MCL 552.507 provides in part:

(4) The court shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon the written request of either party or upon motion of the court. The request of a party shall be made within 21 days after the recommendation of the referee is made available to that party.

(5) A hearing is de novo despite the court's imposition of reasonable restrictions and conditions to conserve the resources of the parties and the court if the following conditions are met:

(a) The parties have been given a full opportunity to present and preserve important evidence at the referee hearing.

(b) For findings of fact to which the parties have objected, the parties are afforded a new opportunity to offer the same evidence to the court as was presented to the referee and to supplement that evidence with evidence that could not have been presented to the referee.

(6) Subject to subsection (5), de novo hearings include, but are not limited to, the following:

(a) A new decision based entirely on the record of a previous hearing, including any memoranda, recommendations, or proposed orders by the referee.

(b) A new decision based only on evidence presented at the time of the de novo hearing.

(c) A new decision based in part on the record of a referee hearing supplemented by evidence that was not introduced at a previous hearing.

The flaw in plaintiff's argument is that the trial court did conduct a de novo hearing as contemplated by MCL 552.507(6)(a). That statute specifically provides that a new decision based on the hearing record is a de novo hearing. Additionally, the record shows that plaintiff was given an opportunity to present to the trial court any additional evidence she desired, satisfying MCL 552.507(5).

Plaintiff erroneously relies on *Cochrane v Brown*, 234 Mich App 129, 133-134; 592 NW2d 123 (1999), to assert that the trial court's review of the referee transcripts was insufficient to constitute a de novo hearing because the parties did not agree to it. At the time *Cochrane* was decided, the statute and court rule specifically required the parties' consent to this procedure. *Id.* at 131-132. The statute and court rule were subsequently amended to eliminate this requirement.

MCR 3.215(F)(2) currently states:

To the extent allowed by law, the court may conduct the judicial hearing by review of the record of the referee hearing, but the court must allow the parties to present live evidence at the judicial hearing. The court may, in its discretion:

(a) prohibit a party from presenting evidence on findings of fact to which no objection was filed;

(b) determine that the referee's finding was conclusive as to a fact to which no objection was filed;

(c) prohibit a party from introducing new evidence or calling new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing;

(d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court.

Plaintiff does not assert that she requested the opportunity to present live evidence and was denied. Therefore, the court rule provides no basis for relief.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens